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LaRue v. LaRue: Equitable Distribution of Marital Assets Finally Available in West Virginia

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Case Comment

LaRUE v. LaRUE: EQUITABLE DISTRIBUTION OF MARITAL ASSETS FINALLY AVAILABLE IN WEST VIRGINIA

I. INTRODUCTION

More than a century has passed since the acclaimed Married Women's Property Acts[1] emancipated West Virginia women from financial bondage to their husbands. Yet so often, in these more enlightened times when the cultural trend is toward creating marriages based upon cooperative financial planning, the husband maintains the bank accounts, holds title to real estate and the family cars, maintains a life insurance policy, accumulates future retirement and Social Security benefits in his name, owns stock and perhaps his own business. While this kind of traditional financial management may be satisfactory for the healthy marriage, it places the wife in serious jeopardy when the marriage deteriorates toward divorce.[2] During the marriage, the wife may have been a comforting, supporting companion, diligent homemaker and mother, helped the husband's business, and perhaps earned an income of her own, all the while proceeding on the assumption that labor and frugality would secure the future. But, until recently, whenever divorce intervened and the family wealth was titled in the husband, the wife's marriage-long labors and sacrifices often resulted in a bleak, disappointing future.

The West Virginia Supreme Court of Appeals has recognized that although the Married Women's Property Acts were to be the spark for injecting financial equality into the institution of marriage, stubborn traditional property notions have smothered any attempts to extend financial equality at the divorce court's steps. The court, in recent years, has begun to redefine the circuit courts' equitable powers in divorce actions to enable them to distribute marital property more equitably to prevent one party from being unjustly enriched. Its most recent decision in this regard, *LaRue v. LaRue*,[3] was a bold movement toward allowing a divorced spouse to recoup his or her

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[1] Now embodied in W. VA. CODE §§ 48-3-1 to 25 (1980), the Married Women's Property Acts theoretically give men and women equal rights to acquire, own and control real property.

[2] Throughout this comment, the wife will generally be characterized as the disadvantaged party primarily because that is a more accurate representation of the real social situation and because that was the situation in the present case. However, for the most part, the West Virginia divorce laws put men and women on equal par. Thus, a husband may receive alimony from a wife, W. VA. CODE §§ 48-2-15 and 48-2-16 (1980); *See also* Murredu v. Murredu, 236 S.E.2d 452 (W. Va. 1977); and either spouse's property can be transferred to the more deserving spouse under the equitable distribution formula of LaRue v. LaRue, 304 S.E.2d 312 (W. Va. 1983).

[3] 304 S.E.2d 312 (W. Va. 1983).

share of the marital property. The court ruled that where one spouse has made a material economic contribution to the marital property, upon divorce, the circuit courts have the equitable powers to award that spouse an equitable share, regardless of who is at fault for the divorce, and regardless of the fact that the property to be shared may be titled in the other spouse.[4] Furthermore, the court, with some limitations, extended the right to claim equitable distribution of marital property where the claiming spouse's only contribution was that of performing homemaking services.[5] This holding represents a radical departure from the state's long-held belief in the inviolability of title and indicates that West Virginia is moving along, with the majority of other jurisdictions, toward recognizing marriage as an economic partnership rather than as status-based roles.[6]

II. STATEMENT OF THE CASE

Mr. and Mrs. LaRue had been married for thirty years. Except for seven years early in the marriage, Mrs. LaRue's occupation had been that of a homemaker and mother, having raised two children into adulthood. Mr. LaRue was an accountant earning $43,000.00 a year at the time of divorce. He had encouraged Mrs. LaRue to be a housewife and homemaker and to entertain his business associates. Early in the marriage the LaRues had sold a jointly-owned home and, with the proceeds, purchased another home, with the title in Mrs. LaRue's name. In 1972, when the marriage was faltering, Mr. LaRue had his wife sign a deed transferring the title to his name only. Mr. LaRue did not record the deed until 1979, after the parties had separated. Just before the divorce action was filed, Mr. LaRue withdrew funds from jointly-held bank accounts.

In the divorce action, the Ohio County Circuit Court found inequitable conduct on both sides but concluded that Mr. LaRue's abusive conduct far outweighed that of his wife. Mrs. LaRue unsuccessfully petitioned for a one-half interest in all real and personal property owned by Mr. LaRue. In accordance with its limited equitable powers, the court awarded Mrs. LaRue only $240.00 per month as alimony, an allowance for health insurance, a car, and some personal property.[7] Mr. LaRue retained his car, the family home, the

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[4] *Id.* at 320. This authority is found in W. VA. CODE § 48-2-21 (1980), which states:

> Upon decreeing the annulment of a marriage, or upon decreeing a divorce, the court shall have power to award to either of the parties whatever of his or her property, real or personal, may be in the possession, or under the control, or in the name, of the other, and to compel a transfer or conveyance thereof as in other cases of chancery.

While the language of this section has been in effect and unchanged since 1931, it has only now been interpreted to permit equitable distribution. *See infra* text accompanying note 47.

[5] 304 S.E.2d at 322.

[6] *See* Note, *The Distribution of Marital Real Property Upon Divorce in West Virginia: The Need for Legislative Reform*, 82 W. VA. L. REV. 611, 613-14 (1980).

[7] This was later raised to $450.00. 304 S.E.2d at 329.

"lion's share of the household goods," $27,000.00 in bank accounts, corporate stock worth $2,100.00, his partnership in his accounting firm and control of nine life insurance policies which had been changed to remove Mrs. LaRue as beneficiary.[8]

On appeal, Mrs. LaRue's plight, indicative of that of many others, led the West Virginia Supreme Court of Appeals to empower the circuit courts with greater equitable authority to distribute the marital assets more justly. The court held that a circuit court may transfer title to both real and personal property to satisfy an award for equitable distribution and that such an interest falls within the purview of West Virginia Code section 48-2-21.[9]

The court extended this authority by allowing equitable distribution to a spouse whose only contribution to the marital property was that of providing homemaking services.[10] In other words, a spouse is entitled to claim a share of the property even if he or she had made no material economic contribution to the marriage. However, the court refused to view homemaking contributions as a property interest and instead considered an award on this basis to be more akin to an alimony right. Whereas a spouse may be entitled to equitable distribution for having made a material economic contribution to the marital assets even if he or she is at fault for the divorce, such a right is more tenuous for the faulty party whose only contribution was that of homemaking services.

The court also placed another limitation on recovery rights based on homemaking services. It interpreted section 48-2-21 as authority to transfer title to property from one spouse to the other only where the untitled party has made a material economic contribution toward acquiring the property.[11] Therefore, since homemaking services are considered the *quid pro quo* for financial support from the other spouse, those services are not, according to the court, an additional economic contribution toward the property.[12] The court did say, however, that where section 48-2-21 does not permit transfer of title based on homemaking services, the circuit courts could grant a lump-sum monetary award to satisfy the equitable distribution claim.[13]

In *LaRue*, the court also ruled on some related procedural matters. First, the court held that a claim for equitable distribution must be specifically asserted in the divorce action in order to be considered by the court.[14] Sec-

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[8] *Id.*

[9] W. VA. CODE § 48-2-21 (1980).

[10] 304 S.E.2d at 322. (Overruling that part of Patterson v. Patterson, 277 S.E.2d 709 (W. Va. 1981), which absolutely forbade consideration of homemaking service in the equitable distribution of marital assets under a constructive trust theory).

[11] 304 S.E.2d at 321 (W. Va. 1983).

[12] *Id.* at 322.

[13] *Id.* at 323.

[14] *Id.*

ond, equitable distribution claims were permitted to be settled by property settlement agreements.[15] Finally, equitable distribution based on economic contribution was made available to other pending cases where the issue had been specifically asserted, but equitable distribution claims based on homemaking services were allowed only prospectively and only to those cases already on appeal to the West Virginia Supreme Court of Appeals as of May 25, 1983, the date of the *LaRue* decision.[16]

In his concurring opinion, Justice Neely expressed his concern for the plight of divorced women and his recognition of the insufficiency of alimony to rectify the plight.[17] He casts some light on the problems of distributing future interests,[18] disputes the finding that fault can be considered in claims based on homemaking services[19] and suggests that equitable distribution can now cure the problem of unjust enrichment. He concludes, therefore, that the recently expanded alimony powers which were fashioned to prevent unjust enrichment should be reexamined and perhaps narrowed.[20] Further, he proposed that when one spouse transfers property to the other during marriage, the presumption that the transfer was a gift should not be strictly applied.[21]

Justice Harshbarger, in a separate concurring opinion, also disagreed that fault should be a factor in equitable distribution for homemaking services.[22]

III. DEVELOPMENT

A. *The Early Period—Equitable Distribution in Special Circumstances*

Until the West Virginia Supreme Court of Appeals decided *LaRue*, West Virginia was the only common law state without a statute or judicial decision allowing some form of equitable distribution.[23] Jurisdictions permitting such distribution do not follow a uniform pattern. Most have enacted statutes,[24]

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[15] *Id.* at 323-24.

[16] *Id.* at 324-25.

[17] *Id.* at 328-29 (Neely, J., concurring).

[18] *Id.* at 330-32.

[19] *Id.* at 332-34.

[20] *Id.* at 334-35.

[21] *Id.* at 335-36.

[22] *Id.* at 336 (Harshbarger, J., concurring).

[23] 9 FAM. L. REP. (BNA) 1133 (Jan. 28, 1983). A bill to permit equitable distribution, containing a list of factors to be considered, failed to pass in the 1983 session of the West Virginia Legislature. A similar bill is being considered in the 1984 session.

[24] Only Florida, Mississippi, South Carolina and West Virginia have established some form of equitable distribution through judicial decisions. All four allow distribution for homemaking services. *See* Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980); Landay v. Landay, 9 FAM. L. REP. (BNA) 2401 (May 3, 1983); Reeves v. Reeves, 410 So. 2d 1300 (Miss. 1982) (lump-sum awarded from husband's estate to compensate wife for economic contributions, but homemaker services also

with some giving courts broad discretion without listing criteria.[25] Others have outlined detailed criteria, such as the length of the marriage, the age, physical and emotional health of the parties, their occupations, income, assets, skills, employability, liabilities and needs, and the extent of their homemaking and economic contributions to the marriage.[26]

Statutes vary considerably with respect to what constitutes distributable property. Some states only divide property acquired during the marriage and exempt gifts or inheritances (and property exchanged therefore).[27] Others have variations of these exemptions combined with additional extensions and limitations.[28] Several states allow distribution of property regardless of how or when the property had been acquired.[29]

While most states allow the courts to determine the amount of distribution, a few states allow *equal* division unless the courts find that this division is inequitable.[30] Furthermore, some states provide that marital property is commonly owned once a divorce action is initiated.[31] Considerable difference exists, however, among the states in the consideration of marital misconduct in equitable distribution. In certain states, fault is irrelevant,[32] while in others it is to be a factor within the court's discretion. Some statutes are silent on the subject.[33]

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recognized); Parrott v. Parrott, 292 S.E.2d 182 (S.C. 1982). Eight states are community property jurisdictions and all the other states and the District of Columbia have statutes for equitable distribution.

[25] *See, e.g.*, N.J. STAT. ANN. § 2A:34-23 (West Supp. 1983-1984).

[26] *See, e.g.*, N.Y. [DOM. REL.] LAW § 236 B (McKinney Supp. 1982-83). For a discussion contrasting the fixed-rule approach with the discretionary approach, *see* Note, *Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 B.C.L. REV. 761 (1982).

[27] *See, e.g.*, ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd Supp. 1983-84).

[28] *See, e.g.*, DEL. CODE ANN. tit. 13, § 1513 (1981) (Marital property includes inheritances and gifts from third parties during the marriage); MD. [CTS. & JUD. PROC.] CODE ANN. § 3-6A-05 (1980 & Supp. 1982) (courts shall determine which property is marital property).

[29] *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-81 (West Supp. 1983-84) (court may assign to either the husband or wife all or any part of the estate of the other). *But cf.* IOWA CODE ANN. § 598.21.2 (West 1981 & Supp. 1983-84) (gifts and inheritances subject to property division but only if it would be inequitable to other party or children not to divide it).

[30] *See, e.g.*, ARK. STAT. ANN. § 34-1214 (Supp. 1983) (All marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable. In that event, the statute lists criteria for consideration).

[31] *See, e.g.*, MINN. STAT. ANN. § 518.58 (West Supp. 1983) (It is conclusively presumed that each spouse made a substantial contribution to the acquisition of income and property); N.C. GEN. STAT. § 50-20(k) (Supp. 1981) ("The rights of the parties to an equitable distribution of marital property are a species of common ownership, the rights of the respective parties vesting at the time of the filing of the divorce action."). *Id.*

[32] *See, e.g.*, S.D. CODIFIED LAWS ANN. § 25-4-44 (1977); COLO. REV. STAT. § 14-10-113(1) (1973 & Supp. 1982).

[33] *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-81 (West Supp. 1983-84). *See, e.g.*, IND. CODE ANN.

In 1869, the Married Women's Property Acts were enacted in West Virginia, placing the husband and wife on equal terms with respect to acquiring and owning property. Since then, many attempts had been made to persuade the West Virginia Supreme Court of Appeals to interpret each revision of the West Virginia divorce code to be a legislative recognition of the chancery courts' authority to decree an equitable distribution of marital property.

The 1906 version of section 11, chapter 64 of the West Virginia Code read, "upon decreeing a divorce . . . the court may make such further decree as it shall deem expedient, concerning the estate and maintenance of the parties, or either of them. . . ." While the language seemed broad enough to countenance the equitable distribution of marital property, the West Virginia Supreme Court of Appeals adopted a very narrow interpretation in *Reynolds v. Reynolds*.[34] There the court said,

> The words "concerning the estate" of the parties, are evidently meant to give the court authority to protect each party in the possession and enjoyment of his or her respective estate, subject to such alimony as may be decreed, and not to authorize the transfer of the legal title to the land by way of alimony.[35]

The court did, however, authorize a lien on the husband's property to secure the wife's alimony.[36]

A dozen years later the court, in *Tuning v. Tuning*,[37] demonstrated more flexibility and allowed a lump-sum monetary award as alimony, saying that alimony was intended to compensate the inequity to the wife who had some property interest in the marital estate. This holding represented a notable departure from the traditional notion of alimony as merely the fulfillment of the husband's obligation to support the wife, and it was a major step toward recognizing that divorce courts have wide equitable powers to rectify the incongruities of property distribution upon divorce. Then under the 1923 Code, the court, in *Philips v. Philips*,[38] authorized the transfer of property from one spouse to the other. In both *Tuning* and *Philips*, the court realized that there were exceptional circumstances which justified some limited distribution of property to prevent glaring inequities.[39]

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§ 31-1-11.5-11 (Burns 1980) (only financial misconduct is a factor); ME. REV. STAT. ANN. tit. 19, § 722A (1964). For a brief survey of equitable distribution laws among the states, see Freed, *Equitable Distribution as of December 1982*, 9 FAM. L. REP. (BNA) 4001 (Jan. 11, 1983).

[34] 68 W. Va. 15, 69 S.E. 381 (1910). Reversed lower court which allowed wife to have house and lot conveyed to her as permanent alimony.

[35] 68 W. Va. at 24, 69 S.E. at 385.

[36] 68 W. Va. at 25, 69 S.E. at 385. Such an authorization has been maintained to the present.

[37] 90 W. Va. 457, 111 S.E. 139 (1922).

[38] 106 W. Va. 105, 144 S.E. 875 (1928).

[39] In *Tuning*, the wife was the major economic contributor to the household and the husband had refused to provide any support. In *Philips*, the wife who received alimony and who also held valuable real estate was ordered to convey, to her husband, her half interest in another lot.

To insure that the Code was not a blanket authority to distribute marital assets, in 1930 the court, in *Burdette v. Burdette*,[40] rejected a wife's contention that after twenty-five years of marriage she was entitled to half of the marital property. The court specifically noted the special circumstances present in *Tuning* and *Philips*, which justified some sharing of the property, were not found in *Burdette*.[41]

B. *The Misinterpreted 1931 Code Led to 40 Years of Unwarranted Backsliding*

In 1931, section 11, chapter 64 of the 1923 Code was revised and recodified as West Virginia Code sections 48-2-15 and 48-2-19 (1931). Shortly after the revisions, the court reaffirmed that realty may not generally be taken from the husband and vested in the wife as alimony, but clarified the rule that property may be impressed to secure alimony payment.[42]

West Virginia Code section 48-2-15 (1931) was interpreted to be more restrictive than its predecessors. In *Selvy v. Selvy*,[43] the court noted that this revised section indicated there was no longer the statutory authority over the parties' estates except indirectly as a way to enforce the court's other statutorily-based decrees regarding alimony, maintenance and child custody.[44] While the 1923 Code gave courts limited but direct statutory control over divorcing parties' property, West Virginia Code section 48-2-15 (1931) removed the direct statutory authority and left the courts only indirect control limited to enforcing its other decrees. However, in 1931, a new section, West Virginia Code section 48-2-19 (1931), was added, keeping the door open for any justifiable equitable remedy not otherwise permitted under

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[40] 109 W. Va. 95, 153 S.E. 150 (1930).

[41] 109 W. Va. at 98-99, 153 S.E. at 151.

[42] Games v. Games, 111 W. Va. 327, 161 S.E. 560 (1931).

[43] 115 W. Va. 338, 177 S.E. 437 (1934).

[44] The relevant portion of W. VA. CODE, section 11, chapter 64 (1923), read:

> Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce,...the court may make such further decree as it shall deem expedient, concerning the [estate and] maintenance of the parties, or either of them, and the care, custody and maintenance of the minor children, and may determine with which of the parents the children, or any of them may remain.... [brackets added].

In the 1931 Code, this section was recodified as W. VA. CODE § 48-2-15 and the bracketed words, "estate and," were omitted, seeming to indicate a legislative intent to restrict the courts' authority to force property transfers. Furthermore, W. VA. CODE § 48-2-15 (1931) went on to say, in pertinent part:

> *For the purpose of making effectual any order or decree provided for in this section* the court may make any order or decree concerning the estate of the parties, or either of them, as it shall deem expedient. (Emphasis added.)

The emphasized phrase was noted by the court, in *Selvy*, as the indication that this section limited the courts' power over the estate only to enforcing other authorized decrees. However, the authority to distribute property was moved to a separate section, W. VA. CODE § 48-2-19 (1931). *See infra* note 45.

other code sections.[45] Indeed, the court in *Selvy* was careful to note that this general equity power still existed but failed to recognize it existed by virtue of section 48-2-19.

> [T]o confer the right in a divorce case to control the estate of the parties other than in aid of a decree for alimony, the bill of complaint must contain averments that would rest such jurisdiction, not upon the divorce statute, but on the general equity jurisdiction of the court.[46]

The court in *LaRue* suggested that the *Selvy* court's failure to consider the provisions of section 48-2-19 and the accompanying reviser's notes on the purpose of the statute created an unwarranted restriction on the divorce law.[47]

Since *Selvy*, and for the next forty years, this "unwarranted restriction" remained the law. Upon divorce, a spouse was generally entitled to retain any property in his or her name at the time of divorce, subject only to the courts' general equity powers.[48] In the meantime, other jurisdictions began to revise their statutes to allow equitable distribution of marital property.[49] In West Virginia, the thrust of remedial efforts to avoid the inequities encountered by divorced women came by way of an expanded alimony authority. Curiously, progress in this regard came primarily after the 1969 Code revisions to section 48-2-15 which, for the first time, allowed a husband to receive alimony from his wife.[50]

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[45] W. VA. CODE § 48-2-19 (1931) read:

> Upon decreeing the annulment of a marriage, or upon decreeing a divorce,...the court shall have power to award to either of the parties whatever of his or her property, real or personal, may be in the possession, or under the control, or in the name, of the other, and to compel a transfer or conveyance thereof as in other cases of chancery.

This statute has remained unchanged since 1931 but has been recodified as W. VA. CODE § 48-2-21 (1980).

[46] 115 W. Va. at 343, 177 S.E. at 439.

[47] 304 S.E.2d at 319 n.10 (W. Va. 1983). The reviser's notes to this section read, "As there is omitted from § 15 the provision giving the court power to decree 'concerning the estate of the parties, or either of them'...it is deemed advisable to add this section here."

[48] *See* Patterson v. Patterson, 277 S.E.2d 709 (W. Va. 1981) (fashioned a constructive trust theory); Collins v. Muntzing, 151 W. Va. 843, 157 S.E.2d 16 (1967) (court found no authority to order sale of property and order proceeds be divided between husband and wife, even if both parties consent); State *ex rel.* Hammond v. Worrell, 144 W. Va. 83, 106 S.E.2d 521 (1958) (court has no jurisdiction to decree a partitioning of real estate owned jointly, even with both parties' consent); Wilcoxon v. Carrier, 132 W. Va. 637, 53 S.E.2d 620 (1949) (in absence of a special agreement, wife not entitled to earnings in household or in husband's business); Wood v. Wood, 126 W. Va. 189, 28 S.E.2d 423 (1943) (wife's labor is *quid pro quo* for maintenance; no right to husband's property).

[49] By 1982, forty-three states and the District of Columbia had provisions for equitable distribution. *See* Note, *Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 B.C.L. REV. 761, 762 (1982); *See also* Freed, *Equitable Distribution as of December, 1982*, 9 FAM. L. REP. (BNA) 4001 (1983).

[50] West Virginia also enacted a no-fault divorce law in 1969. W. VA. CODE §§ 48-2-4(a)(7) and 48-2-4(a)(10) (1980 & Supp. 1983).

C. *The Partnership Concept of Marriage Expands Alimony Powers*

A major conceptual change in the marriage relationship spawned the liberalization of alimony awards and later gave rise to the current right to claim equitable distribution. Marriage has come to be recognized as having some aspects of an economic partnership wherein both spouses are recognized as possessing some joint interest in the property acquired during marriage. Traditionally alimony had been considered a punitive and continuing obligation of the husband to support his wife and not as a mechanism for compensating the wife for her contributions to the marriage.[51] But in *Corbin v. Corbin*,[52] the court considered, in granting alimony, the sacrifices the wife had made toward the marriage. The court said,

> A trial court is entitled to take into consideration in awarding alimony both the age and family obligations of a woman as well as the degree to which she has relied to her detriment in choosing to be a housewife and mother rather than to pursue her own independent career.[53]

The partnership concept of marriage and the compensatory nature of alimony was later upheld in *Dyer v. Tsapis*.[54] The court suggested that the legislative no-fault grounds for divorce implies that marriage takes on a contractual nature and therefore, as in contractual matters, the court has power to grant alimony as restitution.[55]

Other modifications in the alimony rules included allowing circuit courts to order certain blameless spouses to pay alimony,[56] and, in *F.C. v. I.V.C.*, the court went so far as to say that instead of fault, "financial realities of the parties must be a court's primary inquiry in any alimony award."[57] This represents a vast departure from the traditional concept of alimony as an obligation and punishment.[58]

Despite this broadening of alimony powers to prevent unjust enrichment, alimony-based remedies fell short of providing equitable relief in many divorces. The fact that alimony may be terminated upon remarriage[59] or upon

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[51] *See* 304 S.E.2d at 322.

[52] 206 S.E.2d 898 (W. Va. 1974).

[53] *Id.* at 903-04.

[54] 249 S.E.2d 509 (W. Va. 1978).

[55] *Id.* at 512-13. *See, e.g.*, Haynes v. Haynes, 264 S.E.2d 474 (W. Va. 1980).

[56] As a general rule, blameless parties are not charged with alimony. Dyer v. Tsapis, 249 S.E.2d at 513. *But see* F.C. v. I.V.C., 300 S.E.2d 99 (W. Va. 1982) (alimony awarded based on need); Haynes v. Haynes, 264 S.E.2d 474 (W. Va. 1980) (alimony awarded in divorce for irreconcilable differences); Dyer v. Tsapis, 249 S.E.2d 509 (W. Va. 1978) (in a voluntary separation divorce, alimony allowed for "inequitable conduct"); Beard v. Worrell, 212 S.E.2d 598 (W. Va. 1974) (faultless spouse seeking divorce because of husband's incurable insanity may be required to pay alimony).

[57] 300 S.E.2d 99, 101 (W. Va. 1982).

[58] *See* W. MORRIS, LAW OF DOMESTIC RELATIONS IN WEST VIRGINIA § 11-2 at 23 (1982 Supp.).

[59] *Id.* at § 11-9 at 149 (1973).

the payor's death[60] illustrates this inadequacy. If one includes the fact that alimony may be forfeited by a spouse who is at fault in the divorce, and then adds the difficulty of enforcing payment, it is clear that one spouse may unjustly lose all that he or she had labored for during the marriage.

Another remedial step in the equitable partnership idea came in *Murredu v. Murredu*.[61] There, the court affirmed the circuit court's decree that awarded the husband custody of the children and exclusive use of the jointly-held home and furnishings as an incident to child custody, until the youngest child reached the age of eighteen. This arrangement can arguably be considered an order for alimony payment in a form other than payment of cash, and not a decree for equitable distribution.[62]

D. *The Final Wave—Constructive Trusts and Equitable Distribution*

The final wave of progress began in 1981 with the case of *Patterson v. Patterson*.[63] There the court fashioned a constructive trust theory which enabled a spouse to claim an interest in marital property titled in the other spouse if the claiming party had made a measurable economic contribution toward that property. The purpose of the constructive trust was to redress unjust enrichment resulting from equitable wrong;[64] it operated to impress a trust upon the property for the benefit of the untitled spouse.[65] Such a trust could be established regardless of the fault of the parties and was not subject to the same shortcomings and terminability as alimony.

Patterson was the final stepping stone to the court's decision in *LaRue*. Its greatest limitations were that a constructive trust could not be impressed merely on the basis of homemaking services,[66] and it did not recognize the authority to transfer real property to the deserving spouse in lieu of or as a supplement to alimony.[67] The court, in *LaRue*, finally removed those limitations but left in its wake still other problems, such as the difficulty in determining marital assets and the inequity present when the wife is at fault and her only economic contributions are homemaking services.

IV. ANALYSIS

The line of cases culminating with *LaRue* shows a rather obstinate pro-

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[60] *In re* Estate of Hereford, 250 S.E.2d 45 (W. Va. 1978).

[61] 236 S.E.2d 452 (W. Va. 1977).

[62] *See* W. MORRIS, LAW OF DOMESTIC RELATIONS IN WEST VIRGINIA § 11-11 at 27 (1982 Supp.). *See also* Sandusky v. Sandusky, 271 S.E.2d 434 (W. Va. 1981) (allowed exclusive use and possession of marital home as an incident of alimony, custody and maintenance of the child); McKinney v. Kingdon, 251 S.E.2d 216 (W. Va. 1978) (allowed equitable distribution of separately owned car).

[63] 277 S.E.2d 709 (W. Va. 1981).

[64] *Id.* at 716.

[65] *See* 5 A. SCOTT, THE LAW OF TRUSTS § 404.2 (1967 & Supp. 1983).

[66] Patterson v. Patterson, 277 S.E.2d 709, 712 (W. Va. 1981).

[67] *Id.* at 716.

gression through an area of law which has been scrupulously guarded on one flank, by the seemingly immutable belief in the inviolability of title, and ferverently fortified, on the other, by allies from church and state who hold traditions of matrimony to be sacrosanct. Although lagging behind the thrust in other jurisdictions,[68] the development of property rights after divorce in West Virginia cannot be characterized as perverse. The economic plight of divorced women is not fully eradicated by the *LaRue* decision, but the potential for easing the plight is finally at hand.

A number of issues arise now that equitable distribution is possible in West Virgina: 1) What asssets will be considered as marital property? 2) To what extent should fault be taken into consideration when distributing marital assets claimed as compensation for homemaking services? and 3) Will the *LaRue* decision affect future alimony awards? Overlying these issues is perhaps the more intriguing question of whether circuit courts will use their equitable authority in such a way as to actually decree fair distribution of marital property.

A. *Applying the Formula for Determining Marital Assets*

While the *LaRue* decision seems to acknowledge that marriage is a kind of economic partnership,[69] it by no means establishes equal rights to marital property such as those enjoyed by those in community property jurisdictions. In fact, the established right was only a *claim* to a *fair* share in the property acquired during marriage. Whether one actually is awarded any share of the property is entirely within the court's discretion. Even when the court finds cause to transfer property from one spouse to the other, there is never a guarantee that the spouses will get their fair share.

According to *LaRue*, the court is to consider the respective economic contributions made by both parties during the marriage as weighed against the net assets that are available at the time of divorce. "Net assets" do not include assets acquired before marriage or assets acquired during the marriage by way of inheritance or gift from a third party. Furthermore, the indebtedness owed against such assets should ordinarily be deducted from its fair market value.[70] The courts may also consider the value of gifts made from one spouse to the other in calculating the amount of equitable distribution.[71]

Whether or not there is a fair distribution of assets will depend largely upon what assets are determined to be marital property. For even an

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[68] *See* Freed, *supra* note 49.

[69] 304 S.E.2d at 319-20.

[70] *Id.* at 321.

[71] *Id.* Thus, where a husband purchases a home with his own assets and places legal title in both his and wife's names, or in the wife's name alone, it would be permissible for the court, after determining the amount of equitable distribution due the wife, to consider, as an offset, the initial value of the wife's share of the home. *Id.* at 321 n.14.

equitable distribution may often seem unfair because the court refused to consider a substantial portion of one spouse's wealth to be part of the distributable assets. Three very typical and sizeable assets which can be excluded from the marital property are premarital assets, inheritances, and individual gifts from a third party to a spouse.[72]

1. Premarital Assets

Among the many characteristics of the marriage relationship is the concept of sharing. In the absence of an agreement to the contrary, the spouses generally assume that they will share their wealth together, however and whenever accumulated, and that they will remain married forever. However, the court, in *LaRue*, specifically exempts distribution of assets held by one spouse before the marriage.[73] Thus, when a woman marries a wealthy individual and, for obvious reasons, feels it unnecessary to make any further contributions to the marital estate, the wife has no right to share in the husband's premarital assets upon divorce. Her frugality during the marriage to preserve the premarital wealth, cannot be rewarded after divorce from the husband's premarital assets. Her reward for her thrift would be limited only to those assets acquired during the marriage, including any interest earned on the premarital assets, and limited further to a claim based on homemaking services which would be subject to reduction for fault. In such a marriage, the wife, feeling financially secure, may have foregone opportunities to earn assets independently. Such a decision may, years later, have unfortunate consequences at the time of the divorce. But, depending upon the grounds for divorce, the wife may, nevertheless, get a satisfactory distribution for homemaking services and generous alimony as a result of the broadened equitable powers of the court. Again, much will depend upon the extent to which the circuit courts exercise their equitable powers.

2. Individually Acquired Inheritances and Third Party Gifts

Inheritances and gifts from third parties received by one spouse during marriage are also exempt from equitable distribution upon divorce.[74] Here again, too much reliance on the other spouse's inheritances and gifts can lead to a disasterous loss of expectancy upon divorce. Quite often, couples use these unearned assets to create a retirement fund for their mutual security. Despite the spouses' intentions, such a nest egg, upon divorce, reverts to the one who individually acquired the property. One might argue that the retirement fund, even if deposited in a joint account, represented a gift from one spouse to the other and therefore, the donee is entitled to his or her share of

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[72] 304 S.E.2d at 321.

[73] *Id.*

[74] *Id.*

the fund. However equitable that may seem, there is no assurance that the courts will comply with this reasoning. In fact, *LaRue* permits circuit courts to consider such gifts to be an offset against any distribution award to which the donee spouse may otherwise be entitled.[75]

3. Future Interests

Retirement plans, Social Security benefits and insurance policies present peculiar problems in equitable distribution. While the majority opinion failed to consider whether such future interests are part of the marital property, Justice Neely, in his concurring opinion, suggests such future interests would "seem to be...ripe for redistribution under a court's equitable powers."[76]

In most states, pensions are considered marital property,[77] but a number of state courts have held that if the pension rights are contingent or subject to divestment, they are not subject to equitable distribution; similarly, pension plans which are non-contributory or with unascertainable cash values are also exempt.[78] Furthermore, the United States Supreme Court has decided to exclude military and railroad retirement benefits from distribution because those are personal entitlements.[79]

The difficulty lies in trying to determine the present value of such retirement rights. Even if there is a determinable value, company plans often cannot be terminated before retirement except upon death or termination of employment. Justice Neely suggests that courts should, where appropriate, preserve the retirement plan and allow the parties to share in future benefits when they fully mature.[80] This may be a sensible exception to the axiom, "a bird in the hand is worth two in the bush." However, such a solution may prove problematic if the retirement plan beneficiary quits his or her job, thus cutting off the expected benefits. A divorced wife, for instance, would have no control over her former husband's decision to leave the job and its potential benefits.

Life insurance policies provide their own set of problems. Whole life policies generally have negligible cash surrender values and are far more valuable to the beneficiary if not disturbed. But to keep a policy in effect, the

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[75] *Id.* at 321 n.14. Justice Neely, in his concurring opinion, suggests the presumption of gift between husband and wife should not be held too vigorously. *Id.* at 335 (Neely, J., concurring).

[76] 304 S.E.2d at 331 (Neely, J., concurring).

[77] *Id.*

[78] *See, e.g.*, Witcig v. Witcig, 206 Neb. 307, 292 N.W.2d 788 (1980); Delay v. Delay, 612 S.W.2d 391 (Mo. App. 1981); Mueller v. Mueller, 166 N.J. Super. 557, 400 A.2d 136 (1979).

[79] McCarty v. McCarty, 453 U.S. 210 (1981) (military retirement); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (railroad retirement). However, Congress specifically addressed the question of military pensions in the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982) (to be codified at 10 U.S.C. § 1408). The Act, in effect, negates *McCarty*.

[80] 304 S.E.2d at 332 (Neely, J., concurring).

court would have to order the policy holder to keep it intact, thereby creating difficult enforcement problems. Courts will need to search for creative ways to distribute future interests in life insurance policies without destroying the policy's value to both parties.

B. *The Fault Factor—Is Homemaking Service an Economic Contribution?*

The West Virginia Supreme Court of Appeals has rightly recognized the fact that in many marriages, both spouses contribute their individually acquired assets to the marital property. In such cases, the court has decided that an equitable distribution of the marital property is in order under the authority of section 48-2-21, regardless of fault in the divorce. The court considered such economic contributions as giving rise to a property interest. However, in a great many marriages, the wife's only contribution to the marital estate is that of providing homemaking and child-raising services. In these cases, the circuit courts may deny the wife a share of the marital estate where the divorce is her fault.[81] Although this denial appears inconsistent with the court's assessment of marriage as having aspects of an economic partnership, the court distinguishes homemaking services from all other economic contributions because, traditionally, homemaking services were the *quid pro quo* for the husband's financial support.[82] Thus, having received such support during marriage, the wife generally should not be entitled to claim her services as grounds for further compensation.

The court's reasoning in this regard is logically inconsistent. There are two contrasting analytical models at work here which the court has inadequately commingled. One model can be characterized as the Joint Enterprise Model, wherein one can conceptualize the economic aspect of the marriage as a joint account into which the spouses contribute all their marital assets including homemaking services and earnings. Upon divorce, the spouses would receive their proportionate or equitable share of the joint account, including a proportionate share for their homemaking services, regardless of their marital misconduct. This is based on, and consistent with, the court's recognition of the partnership concept of marriage. The other analytical model can be characterized as the Mixed-Contractual Model, wherein one can conceptualize a two-tiered relationship including a joint account of marital economic contributions coupled with the traditional concept of homemaking services as the consideration for financial support of the marriage. Under this model if both spouses contributed financially, the joint account would be equitably distributed but the "contractual" relationship would be addressed under the existing alimony laws, thereby necessarily excluding homemaking services from the equitable distribution scheme. Under this model, a spouse's marital

[81] *Id.* at 321-22.
[82] *Id.* at 322.

misconduct would be considered only in regard to the contractual aspects in accordance with alimony laws, but would not interfere with any recoupment for having made financial contributions.

The court, although not having recognized these models as such, has, in its efforts to reconcile the inequities inherent in the existing state of the divorce law, adopted a hybrid of these two models which is analytically incongruent. The court allows equitable distribution for homemaking services as if adopting the Joint Enterprise Model, but maintains its adherence to the traditional "contractual" notion of homemaking services as if adopting the Mixed-Contractual Model. To confound matters further, the court interjects the fault standard only with regard to equitable distribution claims based solely on homemaking services.

If, conceptually, the spouses exchange homemaking services for financial support, then that contractual relationship is distinct from any property interests vested by virtue of economic contributions made to the marital estate (or, more precisely, the marital surplus). But the court failed to recognize this distinction and implies that homemaking services can be conceptualized as both a *quid pro quo* and a contribution to the marital surplus. This construct would seem to suggest that a faultless homemaker who made no economic contributions to the estate could, conceivably, receive alimony for her husband's breach of marital duty and a share of the marital surplus; perhaps an intended result. Conversely though, if the homemaking spouse is at fault, that fault can be used as a double-edged sword, cutting out her alimony and share of the marital surplus. Therein lies the inconsistency. For, if homemaking services can be conceptualized as giving rise to a claim in the marital surplus, such a claim should remain vested and not be affected by the spouse's misconduct. The inconsistency is a function of conceptualizing homemaking services as being both a marital/contractual duty and a contribution to the marital estate.

Had the court recognized and adopted the Joint Enterprise Model, fault would not be a consideration in claims based solely on homemaking services; and had it adopted the Mixed-Contractual Model, fault could be considered in claims based solely on homemaking services because the alimony laws, which would govern such cases, provide the remedy for such a breach. But it was this latter result which the court was trying to avoid. The existing alimony laws were insufficient to remedy the inequities of homemaker cases like *LaRue*. So, clearly, the intent of *LaRue* was to circumvent the inadequate alimony laws to expand the rights of homemakers. Accordingly, the Mixed-Contractual Model is inadequate and, therefore, implicitly rejected.

In order for the court to adopt the Joint Enterprise Model, it would have to reject the notion that homemaking services are the consideration for the other spouse's financial support. The simplicity of the Joint Enterprise Model, coupled with the court's awareness of marriage as a partnership,

tends to suggest that the Joint Enterprise Model is more appropriate and equitable.

In addition to misconstruing the role of homemaking services, the court also fails to consider one very essential factor. The value of a wife's homemaking services may, and often does, exceed the value of the husband's financial support. One estimate values homemaking services at approximately $40,000.00 per year.[83] Where this is the case and where the wife is at fault, a court may, nonetheless, deny the wife a share of her excess contribution. As Justice Neely points out in his concurring opinion, this incorrectly blurs the distinction between the right to alimony, which is based on the duty to support the other spouse, and restoration of property under section 48-2-21, which is based on a concept of unjust enrichment.[84]

> The right to recover from the marital surplus the proportionate share of one's contribution is a limited but *unqualified* right. . . . Because the statute mandates restoration, a spouse's right to recover his or her share should not be qualified by considerations of fault in the break-up of the marriage, relative wealth, needs of the children or any other matter.[85]

If fault is placed on the wife, her penalty ought to be extracted from the alimony award. Alimony is, and has been by tradition, the mechanism by which a blameless party is compensated for the loss of expect future support.[86] The alimony laws in West Virginia are sufficiently flexible to make the proper adjustment for any fault involved.[87] It is unnecessary to complicate alimony principles with those of property interests.

The obvious major impediment to associating homemaking services with property rights is the difficulty in determining the relative value of the homemaking services vis-a-vis the husband's financial support during marriage. Some additional consideration would have to be given to the husband's homemaking contributions. Clearly these factors would be difficult to substantiate and would add further burdens to all parties concerned, including the court, to a procedure already heavily laden with emotional and painstaking evidentiary matters.

While the potential exists for unfair distribution of marital assets, the new law, as expressed in *LaRue*, creates far greater potential for fairer distribution of assets than existed in the past. Any subsequent development in this area will depend upon how the circuit courts exercise this new

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[83] Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1, 42 (1981).

[84] 304 S.E.2d at 332-34 (Neely, J., concurring).

[85] *Id.* at 333 (Neely, J., concurring) (emphasis added).

[86] *See* Burdette v. Burdette, 109 W. Va. 95, 153 S.E. 150 (1930), *aff'd* 110 W. Va. 646, 159 S.E. 833 (1931).

[87] *See supra* text accompanying notes 52-62.

authority. Should the courts cling too rigidly to the old property and status notions of marriage[88] and allow fault to interfere too often and too much in the distribution of marital assets, the West Virginia Supreme Court of Appeals will have to reexamine the distinction between alimony and restoration and clarify whether homemaking services fall within the realm of property interests or within the quasi-contractual realm of alimony.[89]

V. CONCLUSION

By virtue of a fresh interpretation of West Virginia Code sections 48-2-15 and 48-2-21, West Virginia circuit courts now have at their disposal the authority to equitably settle financial claims in divorce actions. While the West Virginia Supreme Court of Appeals, in *LaRue*, did not guarantee any right to be compensated for contributions to the marital estate, it did give courts more flexibility to award equitable distribution where such a claim is made. In addition to granting alimony awards, the circuit courts may transfer property from one spouse to the other and award lump sums of money as restitution even for homemaking services.

Equitable distribution will not completely eradicate the economic injustice suffered by divorced women, but the potential now exists for restoring to the divorced wife her fair share of her contribution to the marital assets. Whether the principles espoused in *LaRue* will be shared with equal ardor among the circuit courts remains to be seen. The distribution formula is sufficiently flexible to promote equity, but equally flexible to permit less desirable results.

Claimants wishing to make the best of the situation will need to submit rather detailed accounts of the net assets of the marriage, their individual economic and homemaking contributions, the nature and purpose of any interspousal gifts, the disposition of any inheritance or gifts received from third parties, and the disposition of any assets held before the marriage. All of this adds substantially to the pleading burden and puts the spouse who, throughout the marriage maintained records and accounts, at a decided advantage.

Since the court has not altered the law with respect to its liberal alimony authority, the spouse at fault for the divorce may lose a considerable share of

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[88] *See* Note, *The Distribution of Marital Real Property Upon Divorce in West Virginia: The Need for Legislative Reform*, 82 W. VA. L. REV. 611, 613-14 (1980).

[89] *See* The Uniform Marriage and Divorce Act § 307(a) (1970)(amend. 1971, 1973)(Alternative A) 9A U.L.A. 142 (1979). "[T]he court, without regard to marital misconduct, shall,... equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both." *See also* Note, *Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 B.C.L. REV. 761 (1982).

past and future assets. He or she may be forced to give up the other spouse's share of the marital assets regardless of title and may have to pay rather substantial alimony as both compensation for sacrifices made by the other spouse during marriage[90] and as the fulfillment of the marital support obligation.

As the trend in West Virginia seems clearly to advance toward recognizing marriage as having aspects of an economic partnership, we should see significant improvement in the settlement of marital assets in future divorce actions.

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[90] *See, e.g.*, Corbin v. Corbin, 206 S.E.2d 898, 903-04 (W. Va. 1974). *See also supra* text accompanying note 53.